Before the
Federal Communications Commission
Washington DC 20554

In the Matter of	)	
	)	
Revision of Part 15 of the Commission's Rules	)	ET Docket 98-153
Regarding Ultra-Wideband Transmission	)	
Systems	)	

Opposition of XtremeSpectrum, Inc. To Petition for Reconsideration Of Cingular Wireless LLC

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SUMMARY

Cingular first sought reconsideration of the rules on ultra-wideband (UWB) a year ago. The Commission duly considered Cingular's views, rejected them, and reaffirmed the rules in most essential respects.

Now Cingular is back for another try. Its arguments largely rehash the same points Cingular and others raised in the proceeding prior to the First Report and Order, then raised again in the first reconsideration round. The Commission has now turned down those arguments not once, but twice. There is no reason to hear them again. Indeed, Section 1.429(i) of the Commission's Rules mandates dismissal of a repetitious reconsideration petition. This forestalls the endless process of a party seeking reconsideration of each preceding denial, as Cingular attempts to do here.

Cingular's recycled arguments go mostly to claims that the record is inadequate. In fact, Cingular's quarrel is not actually with the record, but with the result. Yet the Commission has fully explained that result, and explained it again on reconsideration. Cingular can ask for no more.

Cingular also presents two new arguments. Both are late. Cingular could have presented either one before the First Report and Order, or else in the first reconsideration round. Cingular has no excuse for holding them back until the last minute.

One of these is a complaint that the Commission ignored the recommendations of its Technological Advisory Council (TAC). But the Commission is always free to do just that, as the TAC's role is wholly advisory. And, in any event, the TAC's recommendations on the whole are much friendlier to UWB than Cingular represents.

The other new argument makes the far-reaching claim that UWB -- along with all other unlicensed operation -- is unlawful under Section 301 of the Communications Act. Again, Cingular offers no reason for raising the issue so late. And taking up so broad a question in this highly technical proceeding would be unfair to the hundreds of companies engaged in making and reselling non-UWB unlicensed devices. If the Commission plans to ask if those companies' activities are illegal, they have a fundamental right to be heard.

At the same time, however, there can be no serious doubt that unlicensed operation comports with the Communications Act. First, Section 302a of the Act on its face authorizes the Commission to regulate non-interfering radio frequency devices. Second, even if that were in doubt, unbroken decades of appellate precedent gives great deference to the Commission's construction of the Act. Third, the case law extends an even greater degree of deference to the Commission where, as here, it acts in the exercise of its particular technical expertise. Fourth, the case law further gives the Commission unquestioned authority to "fill in the gaps" in the statute. And fifth, Congress's repeated amendments of the Communications Act, while leaving the rules on unlicensed devices unchallenged, amount to ratification of those rules.

In the end, Cingular has failed to make its case for reconsideration. It presents no new facts or law to counter the denial of its first reconsideration request. It offers no reason for waiting five years to present the issue of statutory authority. And its argument on that issue does not even mention, much less distinguish, the vast body of precedent that utterly negates Cingular's stand.

The Commission should dismiss Cingular's petition pursuant to Section 1.429(i), or else expeditiously deny the petition on the merits.

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Pursuant to Section 1.249(f) of the Commission's Rules, XtremeSpectrum, Inc. hereby opposes the Petition filed by Cingular Wireless LLC seeking reconsideration of the Commission's Memorandum Opinion and Order on ultra-wideband (UWB) communications.[1]

I. CINGULAR'S PETITION MUST BE DISMISSED AS REPETITIOUS.[2]

This is Cingular's second Petition for Reconsideration. The Commission has already denied Cingular's Petition for Reconsideration of the First R&O in an 89-page order that thoroughly addressed the issues raised by Cingular and the other petitioners.[3] Cingular's present Petition now revisits the same issues.

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[1] Petition for Reconsideration of Cingular Wireless LLC (filed May 22, 2003) (Cingular Petition), seeking reconsideration of *Ultra-Wideband Transmission Systems*, 18 FCC Rcd 3857 (2003) (Memorandum Opinion and Order and Further Notice of Proposed Rule Making) (MO&O), *affirming with modifications Ultra-Wideband Transmission Systems*, 17 FCC Rcd 7435 (2002) (First R&O). Today XtremeSpectrum is also filing a separate Opposition to the Petition for Reconsideration of the Satellite Industry Association. XtremeSpectrum manufactures ultra-wideband communications systems as its sole business.

[2] XtremeSpectrum seeks dismissal of the Satellite Industry Association Petition on the same grounds.

[3] MO&O at paras. 74-97.

Duplicative petitions for reconsideration are subject to dismissal. The Commission's Rules provide:

> Any order disposing of a petition for reconsideration which modifies rules adopted by the original order is, to the extent of such modification, subject to reconsideration in the same manner as the original order. *Except in such circumstance, a second petition for reconsideration may be dismissed by the staff as repetitious*.[4]

Because the MO&O did not modify the rules Cingular objected to in its first Petition for Reconsideration, Cingular's present petition should be dismissed pursuant to this rule.

Just a few weeks ago, the Commission held:

> Bare disagreement, absent new facts and arguments, is insufficient grounds for granting reconsideration. Furthermore, petitions for reconsideration are not granted for the purpose of altering our basic findings or debating matters that have been fully considered and substantively settled.[5]

A decision few weeks earlier explained:

> The Commission does not grant reconsideration for the purpose of allowing a petitioner to reiterate arguments already presented. *This is particularly true where a petitioner advances arguments that the Commission previously considered and rejected in a prior order on reconsideration.* If this were not the case, the Commission "would be involved in a never ending process of review that would frustrate the Commission's ability to conduct business in an orderly fashion."[6]

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[4] 47 C.F.R. Sec. 1.429(i) (emphasis added).

[5] *Certification of Equipment in the 24.05-24.25 GHz Band*, ET Docket No. 98-156, Memorandum Opinion and Order, FCC 03-175 at para. 10 (released July 21, 2003) (citation footnoted omitted).

[6] *Competitive Bidding Procedures*, 18 FCC Rcd 10180 at para. 48 (2003) (emphasis added; citation footnotes omitted), *quoting Warren Price Communications, Inc.*, 7 FCC Rcd 6850 (1992). *See also Regulatory Flexibility in the 218-219 MHz Service*, 17 FCC Rcd 8520 at para. 15 (2002) (similar).

The rule on repetitious filings "brings finality to [the Commission's] decision making process and eliminates uncertainty."[7] It may be waived only when "the arguments that petitioners proffer in support of their requests [are] so compelling that they warrant departure from this policy."[8]

Nothing in the second Cingular Petition is remotely "so compelling" as to justify departing from the policy against repetitious reconsiderations. The Commission has already rejected most of Cingular's arguments. And Cingular cannot support a second reconsideration by criticizing the Commission's denial of its first one. That leads to the infinite regress the Commission rejected in *Competitive Bidding Procedures*, above.

Cingular does advance two new positions: a claim that the Commission ignored recommendations of its Technological Advisory Council (TAC), and a legal argument that unlicensed operation such as UWB is outside the Commission's statutory authority. We respond to both of these points below. But Cingular could have presented either argument at any time during the long pendency of this proceeding. All of the TAC reports that Cingular cites are dated well before the First R&O, and most are dated before the Notice of Proposed Rulemaking. Had Cingular raised the TAC issues in a timely manner, the Commission could have resolved them in the First R&O rather than now. Similarly, the Part 15 statutory argument could have been raised in response to the 1998 Notice of Inquiry, or at any time thereafter. The Commission should not allow Cingular to extend this proceeding by doling out its arguments through multiple reconsideration cycles .

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[7] *37.0-38.6 GHz and 38.6-40.0 GHz Bands*, 14 FCC Rcd 12428 at para. 9 (1999), *citing MTS and WATS Market Structure*, 99 FCC 2d 708, 711, 712 (1984); *MTS and WATS Market Structure*, 97 FCC 2d 834, 879 (1984).

[8] *Id*.

XtremeSpectrum therefore requests that the Cingular Petition be dismissed without further consideration as repetitious pursuant to Section 1.429(i) of the Commission's Rules.

II. THE COMMISSION'S DECISIONS REST ON A FULLY ADEQUATE RECORD.

Cingular continues to insist the First R&O rests on an inadequate record.[9] XtremeSpectrum responded to these same assertions when it opposed Cingular's first reconsideration petition.[10] We refer the Commission to our earlier Opposition, particularly with respect to Cingular's current arguments concerning interference into PCS and E-911[11] and adequacy of the UWB indoor emissions limit.[12] We will not needlessly tax the Commission's resources (and our own) by repeating those responses here.

The Commission has already rejected Cingular's arguments on inadequacy of the record. In going through them again, Cingular adds no newly available facts or analysis. In fact, of course, Cingular's real dispute is not with the scope and quality of the record at all, but with the result. Although Cingular states repeatedly that the Commission "rejected" or "dismissed" or "ignored" or "disregarded" or "discounted" arguments Cingular placed in the record,[13] a reading of the First R&O and MO&O shows the Commission amply considered Cingular's views. It

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[9] Cingular Petition at 12-22.

[10] *See* Opposition to Petitions for Reconsideration of XtremeSpectrum, Inc. at 10-14, 20-22 & attached Technical Statement at i-iv (filed July 31, 2002).

[11] Cingular Petition at 4-7, 15-22.

[12] Cingular Petition at 24-25.

[13] Cingular Petition at 15, 16, 17, 18, 19, 20.

disagreed with Cingular, to be sure. But it explained the basis for its disagreement, and then explained again on reconsideration. Cingular is entitled to no more.[14]

Finally, Cingular objects (for the first time) that the Commission ignored the recommendations of its Technological Advisory Council.[15] But this argument cannot affect the outcome, for three reasons. First, as noted above, Cingular could have raised it in the first reconsideration round (or earlier), and offers no reason for the delay. Second, the role of the TAC is only to "provide advice" to the Commission.[16] The Commission has not delegated its decision-making authority to the TAC, and indeed could not lawfully do so. Third, a fair reading of the TAC's recommendations shows the TAC is far more accepting of UWB than Cingular suggests.[17]

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[14] Cingular also claims to find a contradiction between two passages in the MO&O. In one, the Commission declines to change the UWB rules in the cellular bands because petitioners for reconsideration did not provide any new information to justify such a change. Cingular Petition at 22, *citing* MO&O at para. 90. In the other passage, the Commission defends its rules by stating that they rest on analyses of every aspect of interference. *Id*. at 22, *citing* MO&O at paras. 96. Cingular asks: If no data were provided on UWB/cellular interference, how could the Commission have considered every possible aspect of interference? *Id*. at 22-23. But there is no contradiction here. The First R&O (at para. 192) considered interference to the cellular bands and set UWB limits accordingly. When no party supplied data that called those limits into question, the MO&O (at para. 90) left the limits unchanged. Far from "unreasoned decisionmaking," as the Cingular Petition (at 23) claims, this is a wise exercise of agency discretion.

[15] Cingular Petition at 13-14.

[16] *FCC Requests Nominations for Membership on the Technological Advisory Council*, Public Notice (released Dec. 1, 1998). "The TAC is advisory only. Recommendations to add or remove regulations would have to put into effect by the agency, but only if it so chooses." *Report: First Meeting of FCC Technological Advisory Council II* at 8 (dated Aug. 26, 2001).

[17] To take just one example: Cingular (at 3) quotes the TAC as saying, "It may be that the only way to move forward [with UWB] is by controlled experiments with real systems."

The record shows the Commission's decisions in both the First R&O and the MO&O are fully justified. Those decisions should stand.

III. THIS PROCEEDING SHOULD NOT ADDRESS CINGULAR'S ARGUMENT THAT UNLICENSED OPERATION VIOLATES THE COMMUNICATIONS ACT.

According to Cingular, the Commission's authorizing unlicensed UWB violates the Communications Act.

The Commission should decline to consider Cingular's statutory argument, for three reasons.

A. Cingular's Argument Comes Too Late.

This proceeding began just over five years ago.[18] The very first sentence of the Notice of Inquiry announced the Commission was contemplating UWB on an unlicensed basis.[19] Cingular could have raised its statutory objection in comments or reply comments on the Notice of Inquiry. It could have raised the objection eighteen months later, in comments or reply comments on the Notice of Proposed Rulemaking. Or it could have raised the objection two

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But at its very next meeting, the TAC suggested "allow[ing] the FCC to quickly authorize some simple non-intrusive UWB operations and get on-air experience with sharing and spectrum overlay." *Report: Fourth Meeting of the FCC Technological Advisory Council* at 1 (dated April 8, 2000).

Cingular (at 4, *citing* "Fourth Meeting Report at 9-10") states, "The TAC also encouraged the FCC to refrain from permitting new unlicensed operations such as UWB until the noise floor study was complete." We cannot find that recommendation in the document cited.

[18] *Ultra-Wideband Transmission Systems*, 13 FCC Rcd 16376 (1998) (Notice of Inquiry).

[19] "The Commission is initiating this inquiry on its own motion to investigate the possibility of permitting the operation of ultra-wideband (UWB) radio systems *on an unlicensed basis under Part 15 of its rules*." *Id*. at para. 1 (emphasis added).

years later still, in its first reconsideration petition. Indeed, by then a similar argument had been on the public record for months in another proceeding.[20] But instead Cingular held the argument back, springing it on the Commission and the parties only now, at the last possible moment. Cingular should not be permitted to disturb the outcome of a long and difficult proceeding with this last-minute challenge.

When Cingular raised similar arguments in a late-filed pleading just one day before adoption of the MO&O, the Commission dismissed it on procedural grounds.[21] It should do the same here.

B. The Ruling Cingular Seeks Would Have Consequences Far Beyond this Proceeding.

Although Cingular states its statutory objections in terms of UWB, a decision in its favor could affect other Part 15 devices as well, and that would have drastic consequences for thousands of companies and billions of dollars of economic activity. (We discuss below the great public interest in Part 15.) But we doubt that most of the potentially affected parties are even aware of Cingular's Petition. For the Commission to rule on the legal foundations of their industry behind their backs would hardly comport with sound administrative practice. The mop-up stage of this relatively obscure technical proceeding is simply the wrong venue to decide an issue with potentially far-reaching effects.

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[20] Cingular acknowledges that ARRL challenged the statutory basis for Part 15 months before Cingular filed its *first* Petition for Reconsideration. Cingular Petition at 11 & n.70, *citing* Petition for Reconsideration of ARRL, The National Association for Amateur Radio (ET Docket No. 98-156, filed Feb. 13, 2002). We discuss the outcome of that effort below.

[21] MO&O at para. 151.

C. The Commission Recently Ruled Against Cingular's Argument.

Earlier this year, the Commission effectively reasserted its statutory authority to authorize non-interfering Part 15 devices.

A 2001 Commission ruling increased the allowable field strength of unlicensed devices in the 24.05-24.25 GHz band that use a high-gain antenna.[22] In a Petition for Reconsideration, ARRL raised essentially the same argument as Cingular does here: that Section 301 of the Communications Act bars the Commission from authorizing unlicensed operation.[23]

ARRL's original Petition might have been read to deny the lawfulness even of unintentional emitters such as personal computers and CD players. In a subsequent filing, however, ARRL conceded the Commission's jurisdiction to permit non-interfering unlicensed devices,[24] and further conceded the Commission's authority to "draw the line."[25] Citing these concessions, and having found the newly-authorized 24 GHz devices to be non-interfering, the Commission affirmed its decision in a ruling that, it said, did "not reach ARRL's statutory argument."[26]

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[22] *Certification of Equipment in the 24.05-24.25 GHz Band*, 16 FCC Rcd 22,337 (2001).

[23] Petition for Reconsideration of ARRL, The National Association for Amateur Radio in ET Docket No. 98-156 at 4-7 (filed Feb. 13, 2002).

[24] Consolidated Reply to Oppositions to Petition for Reconsideration of ARRL, The National Association for Amateur Radio in ET Docket No. 98-156 at 2-3 (filed June 8, 2002).

[25] *Id*. at 3.

[26] *Certification of Equipment in the 24.05-24.25 GHz Band*, ET Docket No. 98-156, Memorandum Opinion and Order, FCC 03-175 at para. 11 (released July 21, 2003).

Notwithstanding that last phrase, however, the *24 GHz* decision squarely restated the Commission's powers to certify unlicensed devices. *No concession by ARRL can bestow statutory authority on the Commission.* The decision in the *24 GHz* proceeding cannot rest on ARRL's statements, but only on authority granted by Congress. The *24 GHz* decision necessarily reaffirmed the very statutory authority that Cingular challenges here.

* * * *

In short, the Commission should dismiss Cingular's argument on procedural grounds as untimely, beyond the scope of the proceeding, and repetitive of a recent decision.

IV. UNLICENSED OPERATION DOES NOT VIOLATE THE COMMUNICATIONS ACT.

We strongly believe the Commission should dismiss Cingular's petition on the procedural grounds laid out above. Nonetheless, in case the Commission proceeds to the substantive legal issues that Cingular raises, we turn to those now.

Cingular quotes the Communications Act:[27]

> No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio . . . except under and in accordance with this chapter and with a license in that behalf granted under the provisions of [the Act].[28]

Because the Act mentions a licensing requirement, and does not expressly refer to unlicensed operation, Cingular concludes unlicensed operation is contrary to the statute and hence unlawful.

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[27] Cingular Petition at 10.

[28] 47 U.S.C. Sec. 301.

XtremeSpectrum disagrees for the reasons set out below.[29]

A. The Commission Correctly Construes the Communications Act as Authorizing Unlicensed Operation.

1. Section 302a authorizes the Commission's Part 15 regulations.

Among other statutory provisions, the Commission cites Section 302a of the Communications Act as authorizing the UWB rules under Part 15.[30] In pertinent part, Section 302a provides:

> The Commission may, consistent with the public interest, convenience, and necessity, make reasonable regulations (1) governing the interference potential of devices which in their operation are capable of emitting radio frequency energy by radiation, conduction, or other means in sufficient degree to cause harmful interference to radio communications . . . .[31]

Cingular's challenge raises two questions of statutory delegation. First, can the Commission lawfully construe Section 302a to authorize unlicensed devices? Second, who decides whether the Commission's Part 15 rules are "reasonable" under Section 302a?

Once asked, both questions all but answer themselves. As we show below, a long, unbroken line of precedent gives the Commission broad discretion to construe its own statute, and even greater discretion when applying its expertise to regulate in technical areas. Moreover,

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[29] The following argument draws in part on the Opposition to Petition for Reconsideration of ARRL, the National Association for Amateur Radio of Intersil Corporation, Symbol Technologies, Inc., Wireless Ethernet Compatibility Alliance, and XtremeSpectrum, Inc. (ET Docket No. 98-156, filed May 31, 2002).

[30] First R&O at para. 279.

[31] 47 U.S.C. Sec. 302a(a).

even if Part 15 approvals otherwise lay beyond the express language of the Act, the Commission would still have ample authority to "fill in the gaps" in the statute.

2. The Commission's construction of the Act is entitled to great deference.

No principle of administrative law is better established: "Considerable weight should be accorded to an executive department's construction of a statute it is entrusted to administer."[32] An independent agency, such as the Commission, receives the same deference.[33] Charged with administering the Communications Act, the Commission is entitled to wide latitude in its constructions. Cingular has offered nothing to overcome the strong presumption of validity supporting the Commission's conclusion that Section 302a authorizes unlicensed operation.

3. The Commission is entitled to extraordinary deference when applying its technical expertise.

Beyond the latitude ordinarily given to an agency construing its own statute, an agency is entitled to further deference in the exercise of its particular technical expertise. The D.C. Circuit recently reaffirmed this long-standing principle: in adopting regulations to accommodate new

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[32] *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* 467 U.S. 837, 844 (1984). *See also Public Citizen, Inc. v. EPA*, No. 02-60069, slip op. at 16 (5th Cir. filed Aug. 15, 2003); *County of Los Angeles v. U.S. Dep't of Health and Human Services*, 192 F.3d 1005, 1013, 1016 (D.C. Cir. 1999); *Association of Bituminous Contractors, Inc. v. Social Security Admin.*, 156 F.3d 1246, 1251 (D.C. Cir. 1998); *Tax Analysts v. IRS*, 117 F.3d 607, 613 (D.C. Cir. 1997).

[33] *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 700 (1984) (upholding FCC action); *Lakeshore Broadcasting, Inc. v. FCC*, 199 F.3d 468, 472 (D.C. Cir. 1999) (same); *Washington Ass'n for Television and Children v. FCC*, 712 F.2d 677, 684 (D.C. Cir 1983) (same). *See also National Wildlife Federation v. EPA*, 2002 U.S. App. LEXIS 7232 (D.C. Cir. 2002).

technologies, the Commission "functions as a policymaker and, inevitably as a seer -- *roles in which it will be afforded the greatest deference by a reviewing court.*"[34]

As communications technologies evolve, Congress cannot be expected to stay abreast of the engineering journals to update the regulatory scheme for each innovation. That is the Commission's job:

> The Commission's authority is stated broadly to avoid the need for repeated congressional review and revision of the Commission's authority to meet the needs of a dynamic, rapidly changing industry. Regulatory practices and policies that will serve the "public interest" today may be quite different from those that were adequate to that purpose [in the past], or that may further the public interest in the future.[35]

Keeping up with technology requires room to construe an earlier statute in light of later technical developments. The U.S. Supreme Court put it plainly:

> [T]he principle of deference to administrative interpretations has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subject to agency regulations.[36]

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[34] *Teledesic LLC v. FCC*, 275 F.3d 75 (D.C. Cir. 2001) (upholding FCC plan for relocating fixed microwave users to accommodate innovative satellite services), *quoting Telocator Network of America v. FCC*, 691 F.2d 525, 538 (D.C. Cir. 1982) (upholding FCC plan for sharing frequencies among competing users). *See also Domestic Securities, Inc. v. SEC*, 333 F.3d 239, 248 (D.C. Cir. 2003) (agency determinations based upon highly complex and technical matters are entitled to great deference).

[35] *Washington Utilities & Transportation Comm'n v. FCC*, 513 F.2d 1142 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975).

[36] *Chevron U.S.A. Inc. v. NRDC, supra*, 467 U.S. at 844 (internal quotation marks and citation footnote omitted).

No one who reads the Commission's Part 15 rules -- especially the UWB provisions -- would deny that they "depend[] upon more than ordinary knowledge." In the words of the D.C. Circuit:

> We confront on review an arcane, fast-moving field of technology . . . . In these circumstances *a reviewing court owes particular deference to the expert administrative agency's policy judgments and predictions* . . . .[37]

The Part 15 rules on unlicensed operation are arguably the most "arcane," and certainly the most "fast-moving," of any in the Commission's Rules. They qualify for the highest degree of deference.

4. The Commission can "fill in the gaps" in its statute.

Finally, even without the customary deference to agency construction, the Commission would still have a separate mandate to authorize unlicensed UWB. The U.S. Supreme Court reaffirmed this principle just last year:

> The latter [subject of regulation] might be expected to evolve in directions Congress knew it could not anticipate. As it was in *Chevron U.S.A. Inc. v. NRDC,* the subject matter here is technical, complex, and dynamic; and *as a general rule, agencies have authority to fill gaps where statutes are silent.*[38]

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[37] *Wold Communications, Inc. v. FCC*, 735 F.2d 1465, 1468 (D.C. Cir. 1984) (emphasis added) (satellite communications). *See also Exxon Company U.S.A. v. Federal Energy Regulatory Commission*, 182 F.3d 30, 37 (D.C. Cir. 1999).

[38] *National Cable & Telecommunications Ass'n, Inc. v. Gulf Power Co.*, 534 U.S. 327, 339 (2002) (emphasis added; citation details omitted) (upholding FCC interpretation of Communications Act). *See also Chevron U.S.A. Inc. v. NRDC, supra*, 467 U.S. at 843 ("The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.") (ellipsis in original), *quoting Morton v. Ruiz*, 415 U.S. 199, 231 (1974).

The evolution of Part 15 devices easily qualifies as "technical, complex, and dynamic." The legal precedents leave no serious doubt that the Commission is authorized to approve them under appropriate regulations.

B. Decades of Tacit Acceptance Signify Congress's Approval of Unlicensed Devices.

Cingular acknowledges the Commission permitted UWB devices as early as 1938, just four years after passage of the Communications Act.[39] Had such devices contravened congressional intent, Congress could easily have enacted a remedy at any time during the past 65 years. It has not done so.

1. Congress has often acknowledged unlicensed operation under Part 15.

Congress's inaction on unlicensed operations cannot be attributed to ignorance. To the contrary, Congress has several times recognized not only the ongoing existence, but also the importance, of unlicensed devices:

- In enacting Section 302a -- which the Commission cites as a statutory basis for Part 15 -- Congress specifically discussed the need for proper regulation of garage door openers, a category of Part 15 device.[40]
- In enacting the Electronic Communications Privacy Act of 1986, Congress noted that cordless telephones "are *regulated under Part 15*, Subpart E of the rules of the Federal Communications Commission (FCC), *and are not licensed*."[41]

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[39] Cingular Petition at 10.

[40] P.L. 90-379, S. Rep. 1276, *reprinted at* 1968 U.S. Code Cong. & Admin. News 2486, 2488.

[41] P.L. 99-508, H. Rep. 99-647, 99th Cong., 2d Sess. at 33 (June 19, 1986) (emphasis added).

- The Balanced Budget Act of 1997 instructed the Commission to auction off certain frequency bands which, among other criteria, had not then been

> allocated or authorized *for unlicensed use pursuant to part 15 of the Commission's regulations* (47 C.F.R. Part 15), if the operation of services licensed pursuant to competitive bidding would interfere with operation of end-user products permitted under such regulations.[42]

(Not merely part of the legislative history, this language was enacted into law.)

2. Congress has ratified unlicensed operation by its acquiescence.

Congress impliedly ratifies a longstanding regulation by leaving it unchanged. This principle goes back at least to 1938, when the U.S. Supreme Court affirmed a 14-year-old tax regulation in part by holding,

> Treasury regulations and interpretations long continued without substantial change, applying to unamended or substantially reenacted statutes, *are deemed to have received congressional approval and have the effect of law*."[43]

In *Beth Israel Hospital v. NLRB*, the Supreme Court again inferred from Congress's inaction that Congress "was satisfied to rely on [the agency] to continue to exercise the responsibility to strike the appropriate balance" among the competing interests at stake.[44] Similarly, in *International Brotherhood of Electrical Workers v. NLRB*, the D.C. Circuit interpreted Congress's decision to

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[42] Balanced Budget Act of 1997, P.L. 105-33 Section 3002(c)(1)(C)(v), 11 Stat. 261 (1997) (emphasis added).

[43] *Helvering v. Winmill*, 305 U.S. 79, 83 (1938) (emphasis added). *See also United States v. Correll*, 389 US 299, 305-06 (1967) (same).

[44] 437 US 483, 497 (1978).

leave a specific statutory provision unchanged as ratifying the responsible agency's forty-year construction.[45]

Ratification is all the more clear when Congress amends other parts of a statute while leaving the provision at issue unchanged.[46] Congress has amended the Communications Act dozens of times. Any of those amendments, including the major overhaul in the Telecommunications Act of 1996, could easily have included a provision to eliminate Part 15 devices. Far from banning them, however, Congress acted to *protect* unlicensed devices the following year, in the Balanced Budget Act of 1997.[47]

In short, Congress has often shown its awareness that the Commission has authorized unlicensed devices. Not only has Congress allowed that construction to stand for more than sixty years, but it has expressly protected the devices that result. Numerous uncontroverted holdings of the U.S. Supreme Court and the D.C. Circuit make plain that Congress's acquiescence amounts to ratification.

C. Cingular's Supplementary Arguments Do Not Change the Outcome.

Cingular raises two narrower arguments that purport to show the Commission lacks authority to authorize unlicensed devices. But neither can affect the result.

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[45] 814 F.2d 697, 711 (D.C. Cir. 1987).

[46] *See Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 382 n.66 (1982).

[47] See note 42 and accompanying text.

1. The 1982 Amendment of Section 301 to mention intrastate communications has no bearing on authority for Part 15.

Cingular quotes a 1955 Commission order that bases the legal rationale for unlicensed operation on its lack of interference to interstate communications.[48] At the time of that order, almost fifty years ago, the language of the licensing requirement in Section 301 mentioned only interstate and foreign communications. Cingular then points to a 1982 amendment that added a specific reference to intrastate communications to Section 301.[49] That amendment, says Cingular, undercut the Commission's rationale and made clear that unlicensed operation is unlawful.[50]

But what Congress took away (in Cingular's view), Congress simultaneously restored. The same amendment that added the intrastate reference to Section 301 also enacted Section 302a[51] -- which, as explained above, is part of the Commission's *present* basis for allowing Part 15 devices. The Commission no longer relies on the intrastate character of unlicensed operations, so the 1982 amendment to Section 301 does not affect the present lawfulness of UWB.

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[48] Cingular Petition at 11, *quoting Restricted Radiation Devices*, 13 R.R.1543, 1544 (1955).

[49] Cingular Petition at 11, *citing* P.L. 97-259.

[50] Cingular Petition at 11.

[51] Communications Amendments Act of 1982, Sec.108, 96 Stat. 1087, 1091-92 (Sept. 3, 1982), *reprinted at* 1982 U.S. Cong. & Admin. News No. 1 (unnumbered).

2. Section 307(e) of the Communications Act has no bearing on unlicensed devices.

Cingular notes that Section 307(e) permits four specific services to operate without an individual license. Cingular states that UWB fits none of these, and thereby concludes that unlicensed operation of UWB is unlawful.[52]

Each of the four services listed was, at one time, subject to an individual licensing requirement. Section 307(e) amounts to nothing more than a decision by Congress that users of these services do not require individual licensing.[53] But Congress did not even suggest, much less decide, that it meant to preclude unlicensed operations by other users. To the contrary, the legislative history of this amendment shows that Congress's decision -- at least regarding citizens band and radio control -- rested on purely practical considerations. Noting the substantial costs of processing and granting millions of license applications, Congress observed that licensing by rule "will produce significant savings without impairing important regulatory interests."[54] The vast numbers of Part 15 devices in use present an even stronger case against individual licensing.

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[52] Cingular Petition at 12. The four exemptions are citizens band, radio control, aviation radio, and maritime radio. 47 U.S.C. Sec. 307(e)(1).

[53] Cingular (at 12) is not quite right in implying that Section 307(e) permits these services to operate without a licence. Rather, the statute provides: "[T]he Commission may by rule authorize the operation of radio stations without *individual* licenses in the following radio services . . ." 47 U.S.C. Sec. 307(e)(1) (emphasis added). Strictly speaking, the services remain licensed, although users are licensed collectively "by rule" rather than individually. The legislative history does refer to the "the 'de-licensing' (of individual licenses)," P.L. 97-259, S. Rep. No. 97-404 at 37 (May 19, 1982), *reprinted at* 1982 U.S. Code Cong. & Admin. News 2237, 2280, but that does not square with the language of the statute.

[54] P.L. 97-259, S. Rep. No. 97-404 at 37 (May 19, 1982), *reprinted at* 1982 U.S. Code Cong. & Admin. News 2237, 2280. At the time of the legislation, there were estimated to be some eight million unlicensed CB operators, a "situation which could create a regulatory nightmare for the Commission if serious attempts were made to remedy this situation." *Id.*

While there is no specific legislative history on licensing by rule of the aviation radio and maritime radio services, the provision comes in a section titled "Elimination of Unnecessary Commission Regulations and Functions," which suggests Congress was merely clearly cleaning out superfluous rules.[55] Certainly there is nothing here to indicate that Congress objected to Part 15 devices.

D. Unlicensed Operation Is in the Public Interest.

Section 302a of the Communications Act, quoted above, authorizes the Commission to regulate radio-frequency-emitting devices "consistent with the public interest."[56]

It should no longer be necessary to argue the public interest in unlicensed Part 15 devices. They are now a major component of the Nation's telecommunications infrastructure. Not only are Part 15 devices an important industry in their own right, but they contribute to the success and global competitiveness of many other industries, including manufacturing, retail, transportation, health care, government (including public safety and law enforcement), education, energy, communications, finance -- indeed, every sector of the economy. Part 15 also helps to further the Commission's long-term goals by conserving licensed spectrum for longer-range communications.

Users find countless applications for reliable, inexpensive, high-capacity radios they can install and move without the costs and delays of licensing. A few examples:

- ***Commercial applications*** include wireless LANs and PBXs, retail cash registers and inventory control, airport baggage handling, package

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[55] Telecommunications Act of 1996, Sec. 403, 110 Stat. 56, 130 (Feb. 8, 1996), *reprinted at* 1996 U.S. Cong. & Admin. News No. 1 (unnumbered).

[56] 47 U.S.C. Sec. 302a(a).

delivery, automated meter reading and load management, alarm services, pipeline monitoring, warehouse picking operations, including catalog sales fulfillment.

- ***Public safety applications*** include imaging in fire and emergency situations, subsurface inspection of highways and airport runways, traffic light control to ease congestion without adding pavement, and countless others.

- ***Low-cost broadband networking*** for access to Internet services and other information networks in schools, libraries, and homes.

- ***Videoconferencing*** among and between buildings for educational instruction, health care monitoring, and judicial procedures.

- ***Hospitals*** and other health care facilities use Part 15 devices for patient telemetry, inventory and billing, and bedside checks on medication.

- ***Stock transactions*** -- most of the transactions on the New York Stock Exchange are mediated by unlicensed wireless terminals.

- ***Internet access*** uses wireless communications links for broadband speeds at distance up to 40 km.

- ***Consumers*** enjoy cordless phones, remote keyless entry for automobiles, nursery monitors (both sound-only and video), wireless headphones and speakers, cordless computer mice and keyboards, toys of many kinds, and countless other products.

Wireless LANs -- the use of low-power radio devices to interconnect components of local area networks -- is a particularly fast-growing Part 15 application. These systems have long been used in businesses, where they are cost- and performance-competitive with wire-in-the-wall installations. One class of standards in particular -- IEEE 802.11x, marketed as "Wi-Fi" -- has recently found a fast-expanding home market as well. And thousands of "hot spot" sites such as airport lounges and coffee houses have set up inexpensive Wi-Fi access points so customers can

use their laptops for on-site wireless Internet access. Newer standards -- including those for UWB -- promise higher data speeds and wider applications.

Part 15 devices contribute not only convenience, but economic growth. Currently unlicensed devices are one of the few bright spots in an otherwise slow technology sector. The Consumer Electronics Association puts the U.S. installed base of unlicensed consumer devices alone at 348 million! -- over three per household.[57] The Commission cites data showing the wireless LAN sector *alone* will reach $5.2 *billion* by 2005.[58] Yet wireless LANs represent only a small part of the market for unlicensed devices, which also includes a host of consumer items together with non-LAN commercial applications. Newer types of Part 15 devices, including Bluetooth and digital modulation systems -- along with UWB -- will all add to the mix.

In short, Part 15 devices contribute convenience and prosperity, without any need for dedicated spectrum. UWB will soon provide additional value. A Commission staffer did not exaggerate in calling Part 15 "the jewel in the FCC's crown."[59] The industry has earned a finding that its products are in the public interest.

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[57] *Unlicensed and Unshackled: A Joint OSP-OET White Paper on Unlicensed Devices and Their Regulatory Issues*, FCC Office of Strategic Planning and Policy Analysis at 22 (OSP Working Paper No. 39, May 2003).

[58] *Id*. at 33, *citing* Jeff Abramowitz, *Wireless LANs -- Poised for Untethered Growth, Mimeo*, 2001, available at http://www.wlana.org/pdf/wlana_industry.pdf.

[59] Remarks of Gregory Czumak at "Opportunities for New Wireless Technologies," Federal Communications Commission, Washington DC (February 16, 2000).

V. CINGULAR IS NOT ENTITLED TO EXCLUSIVITY AS AGAINST NON-INTERFERING ULTRA-WIDEBAND EMISSIONS.

Finally, we respond to Cingular's continuing argument regarding the scope of its own license.

Cingular's first reconsideration petition asserted the Commission's authorizing UWB had violated Cingular's rights as an exclusive licensee.[60] The Commission responded in part with a citation to *AT&T v. FCC* ("*AirCell*") in the U.S. Court of Appeals for the D.C. Circuit.[61] This decision arose from a challenge to the Commission's grant of a waiver to AirCell, Inc. permitting airborne cellular service in the same bands used by traditional terrestrial licensees. Those licensees objected to the AirCell waiver on much the same ground that Cingular objects to UWB -- that the waiver violated their rights as exclusive licensees. The MO&O noted that *AirCell* affirmed the Commission's decision that even an "exclusive licensee" cannot object to secondary use of its spectrum, so long as no harmful interference results.[62] Thus, the Commission continued, an exclusive license does not preclude new services (such as UWB) that do not operationally affect the wireless carriers' operations.[63] Now, in its second reconsideration petition, Cingular objects that the cited decision in *AirCell was* not an affirmance but a remand,

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[60] [First] Petition for Reconsideration of Cingular Wireless LLC at 16-20 (filed June 17, 2002).

[61] 270 F.3d 959 (D.C. Cir. 2001).

[62] MO&O at para. 74.

[63] *Id.,* n.188.

that the decision was premised on an absence of harmful interference to the exclusive licensee, and that the remand was ordered to resolve the interference issue.[64]

The court's decision stated: "Absent harmful interference, AirCell's new system does not trammel upon petitioners' rights as [exclusive] licensees."[65] That unquestionably affirms the Commission's decision that cellular licenses are not "exclusive" as against a non-interfering secondary use. The remand was ordered only to settle the narrow technical question of what signal threshold is appropriate for assessing harmful interference.[66] Contrary to Cingular's implication that the legal issue remains in doubt, the court unequivocally settled the exclusivity question against the cellular licensees.

Thus, the *AirCell* case is direct and dispositive precedent in support of the Commission's position here, in establishing that Cingular's exclusive license does not bar a non-interfering use such as UWB.

CONCLUSION

Cingular's Petition raises two kinds of arguments: those the Commission has already rejected, and those that Cingular could have raised at earlier stages of the proceeding, but did not. Cingular presents neither newly-available facts nor newly-decided precedent. The Commission should dismiss its arguments as repetitious and untimely.

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[64] Cingular Petition at 23. The Commission subsequently concluded on remand that AirCell's operations would not cause harmful interference to the terrestrial licensees. *AirCell, Inc*., 28 Comm. Reg. 369 (2002).

[65] *AT&T v. FCC*, 270 F.3d at 964.

[66] *AT&T v. FCC*, 270 F.3d at 967-68.

The Commission should specifically decline to consider Cingular's argument that the Communications Act bars unlicensed operation. That argument was conceptually available from the first day of the proceeding, had Cingular cared to raise it. At this late stage, the Commission should not permit Cingular to derail the proceeding. Moreover, Cingular's argument (if it were valid) would apply not only to UWB, but could shut down an industry that supplies hundreds of millions of other types of unlicensed devices, most of whose manufacturers, marketers, and users are unaware of this proceeding.

In any event, the statutory argument does not stand up. Finding no words in the Communications Act that say, expressly, "We authorize unlicensed operation," Cingular concludes Part 15 is unauthorized. But to assert that result, Cingular must ignore a long-established body of law on statutory construction. Cingular must disregard the scores of cases that defer to an agency's interpretation of its own statute, and the dozens more that give extraordinary deference to an agency exercising its technical expertise. Cingular likewise must neglect the cases that acknowledge an agency's authority to fill in the gaps in a fast-moving technological environment. Cingular must similarly overlook Congress's choosing to let the Part 15 regulations stand, while amending other parts of the Communications Act dozens of times over. The case law tells us that Congress's action (or inaction) amounts to ratification. And, as if to remove any doubt of its approval, Congress enacted language specifically to protect Part 15 spectrum from auction.

The Communications Act instructs the Commission to regulate radio-frequency-emitting devices in the public interest. And no one can seriously question the public interest in the devices the Commission has approved for unlicensed operation, including UWB.

Finally, although Cingular tries to recast the decision, a recent D.C. Circuit case completely eliminates the argument that an exclusive PCS license bars UWB operation.

The Commission should dismiss the Cingular petition and leave its UWB rules unchanged.

Respectfully submitted,

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September 4, 2003

CERTIFICATE OF SERVICE

I, Deborah N. Lunt, a secretary for the law firm of Fletcher, Heald & Hildreth, P.L.C., hereby certify that a true copy of the foregoing "Opposition to Petition for Reconsideration of Cingular Wireless LLC" was deposited this 4th day of September, 2003 for delivery via first class, United States mail, postage prepaid to the attached Service List, except by hand delivery and e-mail as indicated.

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